PA'WAN TEH MOHD HUSSIN v. SU CITRA BINA SDN BHD

HIGH COURT MALAYA, PULAU PINANG
ABDUL WAHAB MOHAMED JC
[COMPANIES WINDING UP NO: 28NCC-77-07-2014]
6 MAY 2016

COMPANY LAW: *Winding up – Stay of order – Permanent stay of winding up order – Application pursuant to Companies Act 1965, s. 243(1) – Application by contributory – Power to stay winding up order – Discretion of court – Whether circumstances warranted court to exercise its discretion to stay winding up order*

The petitioner ('Citra Bina') served a winding up notice under s. 218(2)(a) of the Companies Act 1965 ('CA') on a company known as Pa'Wan Teh Sdn Bhd ('respondent') and demanded payment for an amount due pursuant to a judgment in default. Since the respondent failed to pay the judgment sum, the petitioner took out a winding up petition against the respondent on the basis that the respondent was unable to pay its debts under s. 218(1)(e) of the CA. Consequently, a winding up order was recorded against the respondent. *Vide* encl. 3, Pa'Wan Teh Mohd Hussin ('applicant'), who was the director and a contributor of the respondent, sought a declaration that a sum of RM2,436,452.05 paid to Citra Bina constituted a valid and final order and for the winding up order against the respondent to be stayed pursuant to ss. 24(3) and 233 of the CA.

Held (dismissing application with costs):

(1) A stay of a winding up order is not ordinarily granted as it has the effect of reviving the wound up company. Whether a winding up order should be stayed or not under s. 243(1) depends on the exercise of the court's discretion based on the evidence adduced. The legal burden is on the applicant in a s. 243 application to make a positive or sufficient case. Judicial discretion of the winding up court in deciding on a s. 243 application should not be fettered as it is clear from the phrase 'on proof to the satisfaction of the court that all proceedings in relation to the winding up ought to be stayed' in s. 243(1). (paras 14, 17, 18 & 19)

(2) The winding up court should be vigilant to ensure that s. 243(1) is not abused to resurrect a commercially insolvent company to the detriment of the creditors and the community in general. To substantiate a s. 243 application, the applicant must adduce credible evidence that if the s. 243 application is allowed, the wound up company is likely to be commercially solvent and is able to pay its debts. (paras 21 & 23)

(3) It was not in public interest and conducive to commercial morality to allow the present application, *inter alia*, because (i) the applicant failed to adduce any evidence as to the current trading position of the respondent; and (ii) there was no likelihood of the respondent's commercial solvency. Further, there was a delay of more than one year

A in making the present application and such a delay had not been explained. Unexplained and excessive delay in a s. 243 application may itself constitute a ground for refusal of the winding up court's exercise of discretion. (paras 26 & 30)

B **(4)** The applicant's seeking of a declaration that the payment of RM2,436,452.05 effected by the DGI as dividends to the petitioner as valid and final was misconceived in law as it was not a remedy permitted under r. 93 of the Companies (Winding Up) Rules 1972. The contributor had no *locus standi* to seek a declaration that the determination by the DGI in respect of the proof of debt filed by the C petitioner was valid and amounted to final payment by the DGI. The determination by the DGI in respect of the proof of debt filed by the petitioner was a matter between the petitioner and the DGI. (paras 31 & 32)

Case(s) referred to:

D *Ga-Seng Paper Marketing Sdn Bhd v. Percetakan Warni Sdn Bhd [2015] 9 CLJ 640 HC* ***(refd)***

Krextile Holdings Pty Ltd v. Widdows [1974] VR 689 ***(refd)***

Re Telescriptor Syndicate Ltd [1903] 2 Ch 174 ***(refd)***

Sri Hartamas Dvpt Sdn Bhd v. MBF Finance Bhd [1992] 1 CLJ 637; [1992] 1 CLJ (Rep) 303 SC ***(refd)***

E *The Ayer Molek Rubber Company Bhd v. Bintang-Bintang Sdn Bhd [2013] 4 CLJ 820 CA* ***(refd)***

Ting Yuk Kiong v. Mawar Biru Sdn Bhd & Anor [1995] 3 CLJ 136 HC ***(refd)***

Tiong Hung Ming v. Kalimantan Hardwood Sdn Bhd; Weeluk Holding Sdn Bhd (Applicant) [2008] 9 CLJ 593 HC ***(refd)***

F *Vijayalakshmi Devi Nadchatiram v. Dr Mahadevan Nadchatiram & Ors [1995] 3 CLJ 493 FC* ***(refd)***

Legislation referred to:

Companies (Winding-up) Rules 1972, rr. 93, 101

Companies Act 1965, ss. 16(5), 24(3), 218(1)(e), (2)(a), 233, 236, 243(1)

G Companies Act 1862 [UK], s. 89

For the petitioner - Lim Hock Siang & Khoo Ching Chiat; M/s Presgrave & Matthews
For the applicant - Nurul Ishtar Ismail & E Jeyasingam; M/s Ghazi & Lim
For the respondent - Yasimisa Begum; Insolvency Dept

Reported by Sandra Gabriel

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JUDGMENT

Abdul Wahab Mohamed JC:

Introduction

I **[1]** This is an application by Pa'Wan Teh bin Mohd Hussin ("the applicant"). The applicant in encl. 31 who is a director and a contributory of a company Pa'Wan Teh Sdn Bhd ("the respondent") is seeking *inter alia*

a declaration that the sum of RM2,436,452.05 paid to SU Citra Bina Sdn Bhd ("the petitioner") constituted a valid and final order and for the winding up order dated 9 October 2014 against the respondent to be stayed permanently pursuant to s. 233 and s. 24(3) of the Companies Act 1965 (the CA).

Background Facts

[2] *Vide* a novation agreement dated 3 September 2012, the petitioner, the respondent and one Jambatan Kedua Sdn Bhd had entered into a contract pertaining to the Second Penang Bridge Land Expressway, Package 3D: Toll Plaza, Administration Building and Related Works ("the contract"). In relation to the contract, the petitioner had obtained a judgment in default against the company on 17 December 2013 *vide* Penang High Court Suit No: 22C-5-11-2013 (the JID). Pursuant to the JID, the respondent and one Usahasama Syarikat BMSB-PTSB Sdn Bhd was adjudged to pay the petitioner, RM2,200,000 together with interest thereon at the rate of 10% per annum from 8 January 2013 until full payment and cost.

[3] The respondent applied to set aside the JID. The High Court dismissed the said application. The respondent did not appeal against the said decision. The petitioner served a winding up notice made under s. 218(2)(a) of the CA on the respondent and demanded payment of the amount under JID but the respondent failed to pay the judgment sum. As a result, on 1 January 2014, the petitioner took out the winding up petition against the respondent on the basis that the respondent was unable to pay its debts when they fall due under s. 218(1)(e) of the CA on 9 October 2014, in the absence of the respondent's solicitor, a winding up order was recorded by the petitioner against the respondent.

[4] The Director-General Insolvency (DGI) was appointed as the liquidator for the respondent pursuant to the winding up order. On 7 April 2015, the applicant filed an application for a permanent stay of the winding up order but withdrew it sometime in May 2015.

[5] On 19 June 2015, the petitioner had filed a proof of debt claiming for the payment of RM2,734,205.48. The DGI had examined and admitted RM2,436,452 as debt owing to the petitioner by the respondent. "Notis Perakuan Bukti Hutang" dated 15 July 2015 was served on the petitioner. No appeal was filed by the petitioner in respect of the amount admitted by the DGI. On 8 January 2016, the DGI paid the sum of RM2,463,452.05 to the petitioner as dividend.

Applicant's Submission

[6] Counsel for the applicant submitted that the DGI in the instant case had legally exercised their duty as the appointed liquidator to the respondent by making full payment of dividends amounting to RM2,436,452.05 in accordance with the amount admitted to the petitioner. This position of the

law is implicit upon reading s. 236 of the CA and r. 101 of the Companies (Winding-up) Rules 1972 and the said amount ought to be declared as valid and final.

[7] Counsel for the applicant also submitted that the order for stay of the winding up ought to be granted to the applicant on the grounds that full payment of dividend has already been made to the petitioner and it is proven that the respondent is no longer insolvent, the DGI has fully paid the duly amount admitted to the petitioner and there is no misfeasance or irregularities that deprives any parties involved especially when the petitioner had fully received the amount admitted.

[8] Counsel for the applicant further submitted that the petitioner is estopped from raising any dispute as to the amount admitted since they have not, to date, exhausted their rights to appeal against the amount admitted by DGI.

Petitioner's Submission

[9] Counsel for the petitioner submitted that the applicant has no *locus standi* to seek a declaration that the determination by the DGI in respect of the proof of debt filed by the petitioner is valid and constitutes final payment by the DGI. The determination by the DGI in respect of the proof of debt file by the petitioner is strictly a matter between petitioner and DGI only under r. 93 of the Companies (Winding-up) Rules 1972 and not the applicant.

[10] Counsel for the petitioner also submitted that the onus of proof lies on the applicant to make out a positive case for a stay under s. 243 of the CA. The court should consider not only the interest of the creditors but the interest of the public at large. It is against public policy and commercial morality to allow an insolvent company to continue trading. This is particularly so since the winding up order was made on the basis that the respondent was insolvent. In this application, the applicant is unable to demonstrate to this court that the respondent is commercially solvent based on the evidence adduced by the applicant.

[11] Counsel for the petitioner also submitted that the fact that the DGI has paid the dividend to the petitioner and the DGI supported this application does not *ipso facto* means that the respondent is a solvent company. The applicant must show solid evidence that the respondent is indeed solvent. The facts adduced in the affidavits filed by the applicant show that the respondent's financial affairs are not in order and the applicant has failed to discharge the burden of showing that the respondent is commercially solvent.

[12] Counsel for the petitioner further submitted that the DGI's report and recommendation cannot be relied on by this court as it does not reflect that the DGI has carried out a proper investigation into the affairs of the company

and the DGI has failed to place before this court all relevant facts without any tinge of partiality, in particular, the statement of affairs filed by the applicant which is obviously not in order.

Findings Of Court

[13] Having considered the submissions by both parties, I am of the view that it is proper for me to first consider and deliberate on the prayer by the applicant on a permanent stay of the winding up order. The applicant seeks for the winding up order dated 9 October 2014 against the respondent to be stayed permanently pursuant to s. 243(1) of the Companies Act 1965 (CA 1965).

Section 243 of the CA reads as follows:

> 243. Power to stay winding up
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> (1) At any time after an order for winding up has been made the Court may, on the application of the liquidator or of any creditor or contributory and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings either altogether or for a limited time on such terms and conditions as the Court thinks fit.
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> (2) On any such application the Court may, before making an order, require the liquidator to furnish a report with respect to any facts or matters which are in his opinion relevant.
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> (3) An office copy of every order made under this section shall be lodged by the company with the Registrar and with the Official Receiver within fourteen days after the making of the order. Penalty: *One thousand ringgit. Default penalty.

[14] Section 243 of the CA 1965 gives jurisdiction to stay the proceedings and if necessary on such terms and conditions the court deems fit. It must be emphasised that a stay of a winding up order is not ordinarily granted as it has the effect of reviving the wound up company to proceeds from the date the stay was granted and the company can thereafter resume the conduct of its business and affairs as if no winding up order existed. (see *Krextile Holdings Pty Ltd v. Widdows* [1974] VR 689). In almost all cases the court will be reluctant to order a stay unless the justice of the case requires to do so and the strict requirements set out in the winding up rules have been satisfactorily complied with, very importantly to protect the creditors and other relevant parties.

How Should An Application Under s. 243(1) of the CA 1965 Be Decided?

[15] The principles that govern the court in the exercise of its jurisdiction whether to grant or refuse a stay have been established in the leading case of *Re Telescriptor Syndicate Ltd* [1903] 2 Ch 174, wherein Buckley J was dealing with an application under s. 89 of the English Companies Act 1862, which is similar to our s. 243 CA 1965, and held as follows:

A In the exercise of its jurisdiction with reference to staying proceedings under an order for the winding-up of a company, the court should, so far as possible, act upon the principles which are applicable in exercising jurisdiction to rescind a receiving order or annul an adjudication in bankruptcy against an individual - in which cases the court refuses to act upon the mere assent of the creditors in the matter, and considers not B only whether what is proposed is for the benefit of the creditors, but also whether the rescission or annulment will be conducive or detrimental to commercial morality and to the interests of the public at large.

[16] In *Krextile Holdings Pty Ltd v. Widdows*, [1974] VR 689, at p. 694, Gillard J of the Supreme Court of Victoria held:

C It is not merely necessary for the applicant to establish that a stay is reasonable in the circumstances. He must satisfy the court it ought to grant a stay. As was emphasised by Buckley J in *Re Telescriptor Syndicate Ltd* [1903] 2 Ch 174 at p 182:

D I decline to order a stay of these proceedings until it is proved to my satisfaction that the winding up ought to be stayed. That will not be proved to my satisfaction until it is shown to me that all the facts are as I hope they are - that the trading operations of this company have been fair and above-board.

[17] Whether a winding up order should be stayed or not under s. 243(1) E of the CA 1965 depends on the exercise of the court's discretion based on the evidence adduced before the court, and the legal burden to persuade the winding up court to exercise its discretion to stay a winding up order under s. 243(1) of the CA 1965 is on the applicant - see Federal Court's judgment in *Vijayalakshmi Devi Nadchatiram v. Dr Mahadevan Nadchatiram & Ors* [1995] F 3 CLJ 493; [1995] 2 MLJ 709. Even if the petitioner, the company's liquidator and all the creditors and contributories of the company are unanimously in favour of a s. 243 application, the winding court may still refuse the said application if the applicant fails to discharge the legal onus to satisfy the court to stay the winding up order.

G **[18]** As decided in the case of *Vijayalakshmi Devi*, the legal burden is on an applicant in a s. 243 application to make a "positive or sufficient case". The applicant should have a heavy burden, as the effect of a stay under s. 243(1) of the CA is permanent and far-reaching. If the s. 243 application is allowed, there is always a risk that the "resurrected" company may subsequently be H unable to pay its debts, to the detriment of the creditors in particular and the business community in general.

[19] The factors to be considered by the winding up court in considering a s. 243 application as explained in the case of *Vijayalakshmi Devi* and the case of *Ting Yuk Kiong v. Mawar Biru Sdn Bhd & Anor* [1995] 3 CLJ 136, are not I exhaustive. Judicial discretion of the winding up court in deciding a s. 243 application should not be fettered as it is clear from the phrase "on proof to the satisfaction of the court that all proceedings in relation to the winding up ought to be stayed" in s. 243(1) of the CA.

[20] In the case of *Ting Yuk Kiong*, Arifin Jaka J (as His Lordship then was) held as follows in the High Court: A

> In exercising its discretion the Court has to consider certain factors and would act on certain principles which have been established by decided cases. In *Re Warbler Pty Ltd* [1982] 6 ACLR 526 the following principles are enumerated: B
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> (a) The granting of a stay is a discretionary matter and there is a clear onus on the applicant to make out a positive case for a stay: *Re Calgary and Edmonton Land Co Ltd* [1975].
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> (b) There must be service of notice of the application for a stay on all creditors and contributories and proof of this *(Re South Barrule State Quarry Co* [1969] LR 8 Eq 688, *Re Bank of Queensland Ltd* [1870] 2 QS CR 113 referred to). C
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> (c) The nature and extent of the creditors must be shown and whether or not all debts have been discharged. (*Krextile Holdings Pty Ltd v. Widdows* [1974] VR 689 at 694; *Re Dalta Homes Pty Ltd* [1972] 2 NSWLR 22 at 26 referred to). D
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> (d) The attitude of creditors, contributories and the liquidator is a relevant consideration. (*Re Calgary and Edmonton Land Co Ltd* referred to).
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> (e) The current trading position and general solvency of the company should be demonstrated. Solvency is of significance when a stay of proceedings in the winding up is sought. (*Re a Private Company* [1935] NZLR 120: *Re Mascot Home Furnishers Pty Ltd* [1970] VR 593 at 598 referred to). E
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> (f) If there has been non-compliance by directors with their statutory duties as to the giving of information or furnishing a statement of affairs a full explanation of the reasons and circumstances should be given. (*Re Telescriptor Syndicate Ltd* [1963] 2 Ch 174 referred to). F
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> (g) The general background and circumstances which led to the winding up order should be explained. (*Krextile Holdings Pty Ltd v. Widdows supra* referred to). G
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> (h) The nature of the business carried on by the company should be demonstrated and whether or not the conduct of the company was in any way contrary to the "commercial morality" or the "public interest". (*Krextile Holdings Pty Ltd v. Widdows supra*, *Re Dalta Homes Pty supra* referred to). H
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> (emphasis added)

[21] If a company is wound up under s. 218(1)(e) of the CA on the ground that the company is unable to pay its debts, the winding up court should give more weight to the consideration of public interest and commercial morality, than the wishes of the company's liquidator, creditors and contributories. This is because the winding up court should be vigilant to ensure that I

s. 243(1) of the CA is not abused to "resurrect" a commercially insolvent company to the detriment of the creditors in particular, and the community in general.

[22] Subject to the consideration of public interest and commercial morality, the wishes of the commercially insolvent company's contributories should be given less weight than the interest of the wound up company's creditors, especially unsecured ones. This is understandable in view of the limited liability of companies and their shareholders as embodied in s. 16(5) of the CA (with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up).

[23] To substantiate a s. 243 application, the applicant must adduce credible evidence that if the s. 243 application is allowed, the wound up company is likely to be commercially solvent and is likely to be able to pay its debts when such debts become due and payable in the future. In other words, there must be cogent evidence of the likelihood of the company's commercial solvency or cash flow solvency.

[24] In support of the above opinion, I refer to the Supreme Court's judgment in *Sri Hartamas Dvpt Sdn Bhd v. MBF Finance Bhd* [1992] 1 CLJ 637; [1992] 1 CLJ (Rep) 303 where Gunn Chit Tuan SCJ (as His Lordship then was) applied the "commercial solvency" test or the "cash flow solvency" test and not the "balance sheet solvency" test and decided as follows:

> As an alternative ground regarding insolvency, it was contended by Mr. Sri Ram that the learned Judge had applied the wrong legal test when he concluded that the appellant had not rebutted the statutory presumption and was therefore insolvent. Counsel said that in the Court below the appellant had led evidence to show that it is the owner of landed assets worth more than RM500 million. The respondent did not dispute those facts in the Court below and there was therefore no challenge on that point. Nevertheless the learned Judge relied on the decision of the Privy Council in *Malayan Plant (Pte) Ltd. v. Moscow Narodny Bank Ltd.* [1980] 2 MLJ 53, which held that the appellant had failed to show that it was not insolvent. Counsel submitted that the correct test would be met by answering a question: "Would the appellant be capable, if necessary, of paying all debts by a realisation of its assets, including any immovable property, and of carrying on some other business if its shareholders so wished out of the net amount realised after payment of all liabilities?". It was further submitted that it was no part of the test that a company should have the capability to meet its liabilities out of its own monies, and in support of that submission, the appellant relied on the decision of the Singapore High Court in *Re Great Eastern Hotel (Pte) Ltd* [1988] 1 LNS 198; [1989] 1 MLJ 161 ...
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> In dealing with "commercial insolvency", that is, of a company being unable to meet current demands upon it, we would respectfully follow the Privy Council in the *Malayan Plant* case and cite the following observations from *Buckley on the Companies Act* (13th Edn.) at p. 460:

> In such a case it is useless to say that if its assets are realised there will be ample to pay twenty shillings in the pound: this is not the test. A company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realisable; but although this be so, yet if it have no assets available to meet its current liabilities it is commercially insolvent and may be wound up.
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> (emphasis added);
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> I rely on the "commercial solvency" test or the "cash flow solvency" test as a factor to be considered in a Section 243 Application because if a company is wound up based on the "commercial solvency" test, this same test should be satisfied by an applicant in a Section 243 Application to stay the same winding up order (obtained based on the "commercial solvency" test).

[25] Reference is also made to the High Court case of *Ga-Seng Paper Marketing Sdn Bhd v. Percetakan Warni Sdn Bhd* [2015] 9 CLJ 640, [2015] 1 LNS 457 where it was decided as follows:

> (a) the applicant has not adduced any evidence of a proposal by a White Knight to provide funds or liquid assets to the respondent;
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> (b) there is no evidence showing that the company is likely to be given a lucrative contract or transaction which may provide a source of income to the company; and
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> (c) there is no affidavit from any financial consultant or accountant which affirms that if this application is allowed, the respondent is likely to be capable of paying all its debts when such debts fall due.

[26] I am of the considered view that this court is not satisfied that it is in the public interest and/or it is conducive to the commercial morality to allow this application. This decision is premised on the following reasons:

(i) the applicant failed to adduce any evidence as to the current trading position of the respondent;

(ii) there is no proposal forwarded to this court on which investor will inject funds and/or capital to revive the company;

(iii) there is no evidence given showing that the company is likely to be given a lucrative contract or transaction which may provide a source of income to the company; and

(iv) there is no expert opinion by a qualified and reputable financial consultant or accountant, especially a "companies restructuring specialist", adduced by the appellant on the likelihood of the company's commercial solvency.

(v) In *Ting Yuk Kiong*, the High Court held that the respondent company was insolvent despite the fact that both the respondent company's creditors and the official receiver has been paid in full. As explained

above, if there is no evidence of the likelihood of the respondent's commercial solvency, this application should be dismissed on this ground alone even if the total value of the respondent's assets far exceeds its total liabilities. The applicant in this case failed to adduce any reliable evidence of the likelihood of the company's commercial solvency.

[27] It must be highlighted that in the case of *Ting Yuk Kiong*, despite the official receiver's report stating its view that the wound up company was solvent and that the official receiver was in support of the wound up company's application for a permanent stay of the winding up order, the High Court went on and held as follows:

> It is not sufficient that the creditors had been paid in full and that the [OR's] fees and expenses have been provided for. This does not in any way reflect the solvency of the company. The payment was made by the applicant who came to the rescue of the company.
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> The [OR] further says in his report that the company is solvent and recommends that the winding up of company be stayed. I am not convinced that the company is solvent as the [OR] appears to me to have expressed his opinion that the company is solvent based on the mere fact that the company had paid its two creditors and that the fees and expenses of the [OR] has been provided for and the fact that the company had RM120,000 cash at hand ...
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> It appears to me that the report does not reflect that the [OR] has carried out a proper investigation into the affairs of the company as he has not stated therein that he has made references to the company's books or audited accounts or made consultations with the principal officers of the company such as the auditor and the secretary. This to my mind he has to do before coming to a conclusion that the company is solvent.
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> Under the circumstances of the case it is my finding that the company is insolvent and based on the fundamental principle that an insolvent company should be wound up: *Re Mascot Home Furnishers Pty Ltd* [1970] VR 593, it is my considered opinion that the winding up petition of the company should not be stayed. For the reasons stated above I rule that the applicant has not made out a case for a stay of the winding up proceedings of the company.
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> The application is therefore dismissed with costs.

[28] Also in the case *The Ayer Molek Rubber Company Bhd v. Bintang-Bintang Sdn Bhd* [2013] 4 CLJ 820, where the Court of Appeal cited with approval the case of *Tiong Hung Ming v. Kalimantan Hardwood Sdn Bhd; Weeluk Holding Sdn Bhd (Applicant)* [2008] 9 CLJ 593, wherein Hamid Sultan bin Abu Backer JC (as he then was) on s. 243 had this to say:

> (b) Section 243 of the Act empowers the court to stay the winding-up proceedings. That discretionary power can be exercised at any time after an order for winding-up has been made, on an application of: (i) the

liquidator; (ii) any creditor; or (iii) contributory. On proof to the satisfaction of the court that all proceedings in relation to the winding-up ought to be stayed, the court may make an order staying the winding-up proceedings either altogether or for a limited time on such terms and conditions as the court thinks fit. Before making any such order on an application for stay, the court may require the liquidator to furnish a report with respect to any facts or matters which in his opinion are relevant. The report of the liquidator, when it is called for by the court, should reflect the fact that he has carried out a proper investigation into the affairs of the company and must make references to the company's book or audited accounts or make consultations with the principal officers of the company such as the auditor and the secretary. This he has to do before coming to a conclusion that the company is solvent. The liquidator is duty bound to place before the court all the relevant facts without any tinge of partiality. The report should also refer to the 'ugly side' of the company's affairs if any and also refer to the adverse effect of the stay on the person seeking it. An office copy of every order made under section 243 is to be lodged by the company with the registrar and also the official receiver within fourteen days after the making of the order and any failure to comply by the liquidator or had obtained judgment against the company in the civil suit, otherwise, it would remain a person 'claiming to be a creditor'.

[29] Even though the OR contended that it is not a mandatory requirement to enclose the wound up company's statement of affairs in its report; to my mind, OR should exercise prudent practice in carrying out a proper investigation into the affairs of the company and must make references to the company's book or audited accounts or make consultations with the principal officers of the company such as the auditor and the secretary. It is the OR's duty to place before the court all the relevant facts without any tinge of partiality.

No Explanation For Delay In Making This Application

[30] This application is filed on 27 January 2016. There has been a delay of more than one year in making this application (from the date of the winding up order dated 9 October 2014 to the date of the filing of this application dated 27 January 2016.) Such delay has not been explained in the applicant's affidavit. Unexplained and excessive delay in a s. 243 application may itself constitute a ground for the refusal of the winding up court's exercise of discretion - see the case of *Ga-Seng Paper*. In the case of *Vijayalakshmi Devi*, the Federal Court decided as follows:

On the issue of delay, based on the facts, we were satisfied that there had been a delay of 5 1/2 years between the time the order for compulsory winding up was granted by the Seremban High Court (30 September 1988) and the filing of the notice of motion for stay (9 March 1994). There seemed to be no explanation offered why the application was not made within a reasonable time. Abdoolcader J (as he then was), in delivering the judgment of the Federal Court in *Mookapillai* [1981] 1 LNS 89; [1981]

A 2 MLJ 114, agreed with the trial judge who dismissed the appellant's summons as having been made rather late, which was some 1 1/2 years after the company was ordered to be wound up and after previous applications for stay were refused. The Federal Court cited with approval the observation of Megarry J in *Re Calgary & Edmonton Land Co Ltd* [1975] 1 All ER 1046 at p. 1050; [1975] 1 WLR 355 at pp. 358-359:

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> That the applicant for a stay must make out a case that carries conviction. It may be that where the liquidation has been proceeding for only a short while the court ought to be more ready to grant a stay than in cases where the liquidation has been proceeding for a considerable time and much has been done on the faith of it.

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[31] With regards to the applicant seeking a declaration that the payment of RM2,436,452.05 effected by the DGI on 8 January 2016 as dividends to the petitioner as valid and final, I am of the considered view that this prayer is misconceived in law as it is not a remedy permitted under r. 93 of

D Companies (Winding-up) Rules 1972. Rule 93 provides:

> If a creditor or the contributor is dissatisfied with the decision of the liquidator in respect of a proof, the Court may on the application of the creditor or contributor reverse or vary the decision ...

E **[32]** Therefore, the contributor has no *locus standi* to seek a declaration that the determination by the DGI in respect of proof of debt filed by the petitioner is valid and amounted to final payment by the DGI. The determination by the DGI in respect of the proof of debt filed by the petitioner is a matter between petitioner and DGI.

F **Conclusion**

[33] For the reasons stated above, I therefore find that the application by the applicant *vide* encl. 31 is devoid of merit and is dismissed with cost.

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